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BEFORE THE
SURFACE TRANSPORTATION BOARD

SUNBELT CHLOR ALKALI PARTNERSHIP Complainant v. NORFOLK SOUTHERN RAILWAY COMPANY and UNION PACIFIC RAILROAD COMPANY Respondents.	)	Docket No. NOR 42130

REPLY OF SUNBELT CHLOR ALKALI PARTNERSHIP TO MOTION FOR PARTIAL DISMISSAL OR, IN THE ALTERNATIVE, EXPEDITED DETERMINATION OF JURISDICTION OVER CHALLENGED RATES

Complainant, Sunbelt Chlor Alkali Partnership ("Sunbelt"), hereby replies to the "Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates" ("Motion"), filed by Union Pacific Railroad Company ("UP") on September 26, 2011. Pursuant to the Surface Transportation Board ("STB" or "Board") order served October 5, 2011, the due date for Sunbelt's reply was extended until December 13, 2011. Contemporaneous with this Reply, Sunbelt has filed a Petition for Clarification that, if granted, would render this Motion moot.

I. BACKGROUND.

By Complaint filed against both Norfolk Southern Railway Company ("NS") and UP on July 26, 2011, Sunbelt challenged the reasonableness of a joint rate for rail transportation of chlorine from Sunbelt's McIntosh, AL production facility to its customer in LaPorte, TX. Sunbelt requested both a rate prescription and reparations beginning March 30, 2011, which is when Sunbelt began shipping chlorine under the joint rate upon expiration of a contract with UP

and NS for the same rail service. NS handles this traffic from McIntosh to the interchange with UP at New Orleans, and UP transports the traffic from New Orleans to LaPorte.

Subsequent to the Complaint, UP withdrew from the joint rate and replaced it with a self-described "local" rate applicable to transportation of chlorine from New Orleans to LaPorte. NS then published a proportional rate from McIntosh to New Orleans. Those rates became effective on July 30, 2011.

Through its Motion, UP asks to be dismissed from this proceeding due to an alleged lack of market dominance, or in the alternative, requests an expedited determination on market dominance. Specifically, UP asserts that it lacks market dominance for its portion of the through movement, because BNSF also provides rail service between New Orleans and LaPorte in interchange with NS. The core issue presented by UP's Motion is whether market dominance can be evaluated separately for the NS and UP segments or whether it must be evaluated for the entire through movement from McIntosh to LaPorte.

Although market dominance would not typically be addressed at this stage of a rate reasonableness proceeding, UP's Motion poses a significant legal question that will influence every aspect of this case and thus should be addressed now in order to avoid the expenditure of unnecessary resources by both the parties and the Board. The answer to this question, for example, will determine whether the stand-alone cost ("SAC") evidence in this proceeding should be based upon a stand-alone railroad ("SARR") for the entire through movement or just the NS segment.[1] Therefore, if the Board concludes that market dominance should be separately

[1] See Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 409 (1989) ("Met Ed") (permitting complainant to submit new SAC evidence for the entire through movement after complainant had relied upon conflicting precedent to develop SAC evidence for just one segment).

determined for each segment of the through movement,[2] Sunbelt supports UP's alternative request for an expedited determination of market dominance.[3]

II. ARGUMENT.

The Board should deny UP's Motion because it is inconsistent with the Board's Bottleneck Decisions.[4] According to Bottleneck I, at 1073-74, because NS has published a proportional rate for its segment of the issue movement, UP is a necessary party to Sunbelt's Complaint:

> [A] shipper's challenge to the reasonableness of a proportional rate covering a bottleneck segment that is combined with a common carriage rate over the non-bottleneck segment must, in our view, address the reasonableness of the entire through rate as a whole. [emphasis added]

The Board did not limit its holding to the combination of two common carrier proportional rates, but instead referred generically to the combination of a proportional rate with any "common carriage rate." This formulation clearly includes the common carrier tariff rate published by UP for its segment of the issue movement, whether or not it is a "local" rate as UP contends.

The Board made this pronouncement after affirming a long-established rule that:

> Where through routes have been constructed by joint or proportional rates, shippers raising rate reasonableness issues under 49 U.S.C. 10701(a) have generally been required to

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[2] The Motion does not challenge the Board's jurisdiction over UP for the period from March 31 through July 30, 2011, during which UP provided service pursuant to both a joint rate with NS and a proportional rate. Motion at 3, note 1. This is an apparent concession by UP that market dominance cannot be segmented for joint and proportional rates. Thus, UP would continue to remain a proper defendant for that time period.

[3] Although UP asserts that "[a]lternative rail transportation by other rail carriers unquestionably constitutes effective competition," Motion at 9, Sunbelt submits that this should not be an automatic conclusion at least with respect to chlorine, where "demarketing" is a real concern in light of nearly uniform railroad pronouncements that they do not want to haul chlorine and would not do so but for their common carrier obligation. Written testimony of Union Pacific Railroad Company, Common Carrier Obligation of Railroads – Transportation of Hazardous Materials, Ex Parte No. 677 (Sub-No. 1) ("Common Carrier – Hazmats"), at page 6 (filed July 10, 2008) ("we prefer not to carry TIH commodities"); Statement of David Burr, Assistant Vice President, Fuel and Risk Management for BNSF Railway Company ,Common Carrier – Hazmats (public hearing July 22, 2008), transcript at page 423 ("The shipment of high hazard commodities is not one that is accepted by choice").

[4] Central Power & Light Co. v. Southern Pac. Transp. Co., 1 STB 1059 (1996) ("Bottleneck I"), clarified at 2 STB 235 (1997) ("Bottleneck II"), aff'd sub nom. Mid-American Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

> challenge the entire rate over a through route, and have not been permitted to challenge a discrete segment. Underlying this requirement is the rationale that "[t]he shipper's only interest is that the charge shall be reasonable as a whole" (Great Northern, 294 U.S. at 463; see also L&N, 269 U.S. at 234; Met Ed, 5 I.C.C.2d at 400-10), and that, as a result, there is no basis for looking only at one component part of that charge.

Bottleneck I, at 1072 (underline added). NS and UP have constructed a through route for the issue movement by combining an NS proportional rate with what UP labels a "local" rate. By definition, the presence of the NS proportional rate, whether or not UP has accurately described its rate as a "local" rate, makes the combination of these two rates a through rate that Sunbelt must challenge as a whole, not by its discrete segments. Union Pacific Railroad Company v. Surface Transportation Board, 202 F.3d 337, 339 (D.C. Cir. 2000) ("It has been a venerable principle of railroad rate regulation that the reasonableness of a rate is to be assessed on a 'through basis'—that is to say, a shipper may challenge only the rate of the origin-to-destination route as a whole, rather than the reasonableness of rates charged for a particular segment of the route.") (internal cite omitted). If Sunbelt may not challenge the reasonableness of the discrete segment rates, it is not proper to evaluate market dominance on a segmented basis.

UP's position would create an anomaly in the law that would undermine the Board's authority and deprive shippers of their rights before the agency. UP claims that local rates are always separately challengeable rates even when used in combination with proportional rates, which are not separately challengeable. If the Board were to accept UP's position and dismiss UP from this proceeding for lack of market dominance over just UP's segment of the through movement, NS undoubtedly would file its own motion to dismiss because a proportional rate cannot be challenged apart from the rate applicable to the entire through movement.[5] Such a

[5] UP's blithe assurance in footnote 6 to its Motion that its absence from the case since July 30 "will not prejudice Sunbelt's claim against NS" cannot bind NS, and it is noteworthy that NS has not affirmed UP's statement.

result would deny Sunbelt any regulatory remedy. Moreover, the ramifications would extend far beyond just this proceeding by insulating the vast majority of joint line rates from regulatory review whenever the bottleneck carrier publishes a proportional rate and the non-bottleneck carrier publishes a local rate. The non-bottleneck local rate could not be challenged for lack of market dominance and the bottleneck proportional rate could not be challenged because it encompasses less than the entire through rate. Clearly Congress did not intend to create a regulatory regime that could be so easily "gamed."

The only exception that the Board created to the bottleneck rule, which prohibits a separate challenge to a proportional rate, is when the connecting carrier provides the shipper with a contract rate. In that scenario, the Board will consider the reasonableness of a proportional rate independent of the total through rate, because the Board lacks jurisdiction over contract rates. Bottleneck I, at 1074-75. See also, Albemarle Corp. v. The Louisiana and North West R.R. Co., STB Docket No. 42097, 2006 STB LEXIS 636, at *2-3 (served Oct. 18, 2006) (applying the Bottleneck Decisions to deny motion to dismiss challenge to proportional rates because a contract existed for remainder of the through movement). The Board has not recognized a similar exception when the non-bottleneck carrier publishes any form of common carrier tariff rate for its portion of the through movement, including local rates.

The Board's failure to recognize an exception for combinations of local and proportional rates appears to have been intentional. The Bottleneck Decisions cite extensively to Met Ed. In Met Ed, 5 I.C.C.2d at 402, the Interstate Commerce Commission ("ICC") reviewed the relevant terminology:

> *Joint rates* are "single-factor" rates between origin and destination on more than one railroad. The shipper pays one overall rate, and does not know, in the normal course, how that rate is divided among the carriers. A *combination rate* is a rate the shipper

> constructs from two or more rates (each a "factor" of the total charge). Typically these rates are "local" to the line of one carrier, but combination rates can be created by combining, for example, two joint rates as well as combining local rates. As distinguished from joint rates, each local rate is a separately published factor. Finally, *proportional rates* are a form of combination rates but with a significant difference. While local and joint rates can be added together without qualification to form a combination rate, proportional rates may only be added together to form a through rate under specified conditions. That is, proportional rates provide that they may only be used for shipments originating beyond a certain point or destined beyond a certain point. [italics in original; underline added]

While observing that local rates are separately published factors, which can be separately challenged when used in combination with joint rates or other local rates, the ICC made no such observation for a combination of local and proportional rates. Rather, because a proportional rate only can be used in combination with another rate, it cannot be evaluated separately from the other rates that comprise the combination rate. "[S]hippers...if charged either a joint or proportional rate, must challenge the rate for the entire through movement; they cannot challenge individual segments." Western Resources, Inc. v. Surface Transportation Board, 109 F.3d 782, 789 (D.C. Cir. 1997). It necessarily follows that the other rates in the combination cannot be evaluated separately from the proportional rate, even if they are local rates.

Moreover, although UP calls its rate a "local" rate, it published that rate with the knowledge and intent that it would be used by Sunbelt to complete a through movement of the issue transportation. As noted in Bottleneck I, at 1060, a "local" rate is "a rate for transportation originating and terminating on the carrier's line." However, the traffic at issue does not "originate" on UP's line, but is transported in joint line service with its origin on the NS. Indeed, this appears to be the only use of UP's rate, which was published expressly for Sunbelt's issue movement and does not appear to be used by any other shipper. Under such circumstances, UP's

rate is part of a through rate that must be challenged as a whole. Cf. Kansas City Southern Ry. Co. v. C.H. Albers Commission Co., 223 U.S. 573, 597-98 (1923), quoting Chicago, Burlington & Quincy Ry. Co. v. U.S., 157 Fed. Rep. 830, 833 (8th Cir. 1906) ("By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged.").

The fact that UP has chosen to publish a self-described "local" rate is of no importance when UP has permitted, and in this case fully intended, that such rate be used in combination with the NS proportional rate to create a through rate for the issue movement. In Alabama Grocery Co. of Huntsville, AL v. Atchison, Topeka & Santa Fe Ry. Co., 197 I.C.C. 726, 727, 728 (1933), the ICC declared:

> The fact that a particular factor may be reasonable or less than reasonable for local application does not necessarily indicate that it would not be too high for application to a through haul. The through rate must be shown to be reasonable.
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> * * *
>
> It is the well-settled rule that if a through rate, either joint or combination, is found unreasonable and reparation awarded, the order runs against the carriers, collectively, that participated in the transportation. [Underline added]

Where the reasonableness of the entire through rate for the entire through movement must be evaluated, market dominance also must be evaluated as to the same through movement. See 49 U.S.C. 10707(a) (defining market dominance as "an absence of effective competition...for the transportation to which a rate applies"). In this proceeding, the transportation to which UP's rate applies is part of a through movement, not a local movement, because NS has restricted its rate to only through movements and UP has allowed, indeed intends, that its rate be used in combination with the NS proportional rate, which cannot be separately challenged.

Consequently, the Board must consider market dominance for the entire through movement, not just UP's segment.

UP cites to very little precedent in support of its anomalous position. See Motion at 7-8. For the most part, UP misconstrues the precedent that it does cite, including the Bottleneck Decisions. The only case cited by UP that actually involved the separate review of individual factors comprising a combination rate is Chevron Chem. (Canada) Ltd. v. Mo. Pac. R.R., Docket No. 40190 (served March 7, 1988) ("Chevron"). Motion at 8. But that case involved a combination of two local rates, not a local rate with a proportional rate. UP's citation to Met Ed is ambiguous *dicta*, which speculates whether the outcome in a prior case was legally correct. The Board's reference in Met Ed, at 5 I.C.C.2d 406, n. 27, to "separately published factors (as opposed to proportional rates)" strongly suggests that it was speculating as to a combination of two local rates, not a proportional rate combined with a local rate. Similarly, UP's citation to Cost Ratio for Recyclables—1993 Determination, Ex Parte no. 394 (Sub-No. 11) (served Dec. 16, 1993), is misplaced because the Board reaffirmed the principal that proportional rates are through rates and that only a combination of two local rates can be separately challenged. Finally, UP's citation to Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 231-32 (1925), also alludes only to separate rate reviews for a combination of local rates. UP has not cited to a single authority for the proposition that a "local" rate can be evaluated separately when used in combination with a proportional rate.

Although UP does not cite to any precedent to support its position, Sunbelt has attempted to identify decisions involving a separate challenge to a proportional rate used in combination with a local rate.

By far, the most common situation in which the ICC has considered the reasonableness of a proportional rate factor separately from a local factor used to create a through rate involves "transit" rates and "rate-breaks" for grain, which the ICC itself has described as a fictional through movement:

> Transit is the shipping of a quantity of a specified commodity (*e.g.*, corn) from Point A to point B for some manufacturing or commercial process and then reshipping the processed product (*e.g.*, corn flour) to destination C at a rate less than the combination of local rates to and beyond B (the transit point) which would otherwise apply....Transit is based on the fiction of a 'through' movement and the application of a through rate, even though the actual movement is separated into two or more distinct hauls.

Investigation of Railroad Freight Rate Structure—Grain and Grain Products, 345 I.C.C. 2977, 2988 (1979) (underline added) ("Grain Products"). See also, Atchison, Topeka & Santa Fe Ry. Co. v. U.S., 279 U.S. 768, 777 (1929) ("The contention that the Santa Fe's cancelled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege.") ("Santa Fe").[6] The ICC's willingness to prescribe proportional rate factors for such movements, therefore, can be viewed as a refusal to recognize this legal fiction in the context of rate reasonableness determinations. Cf., id. at 779 ("Obviously, this practice [transit] cannot convert the independent shipment of grain from Kansas City to the Gulf...into a through movement from Dodge City [to Kansas City] to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise."); Great N. Ry. Co. v. Commodity Credit Corp., 77 F. Supp. 780, 787 (D.Minn. 1948), citing Central R. Co. of New Jersey v. U.S., 257 U.S. 247, 257 (1921) ("Transit privileges rest upon the fiction that the incoming and the outgoing

[6] See Grain Products at 2987-97 for a detailed discussion of "transit" and the related concept of "rate-break" combinations. See also, Southeastern Association of Railroad and Utilities Commissioners v. Atchison, Topeka & Santa Fe Ry. Co., 321 I.C.C. 519, 521-23 (1964).

transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination.").

There also are a few old ICC decisions in which the Board has considered the reasonableness of just the proportional rate when combined with a local rate outside of the transit and break-rate context. E.g., Phoenix Utility Co. v. Southern Ry. Co., 173 I.C.C. 500 (1931); Basing Rates on Paving Brick from Jacksonville, Fla. to Florida Points, 100 I.C.C. 390, 392 (1925) ("We are continually dealing with proportional rates without reference to the other factors with which they are used in the construction of through rates."). Contra, Stevens Grocer Co. v. St. Louis, Iron Mountain & Southern Ry Co., 42 I.C.C. 396, 398 (1916) ("Proportional rates as such may not be attacked as unreasonable or otherwise in violation of the act unless the through rates are also attacked"). Those older ICC decisions that have evaluated a proportional rate separate from its combination with a local or joint rate, however, espouse a legal position similar to Auburn Mills v. Chicago & Alton R.R. Co., 222 I.C.C. 495, 498 (1937), which the ICC repudiated in Met Ed (5 I.C.C.2d at 407). Consequently, their precedential value is questionable.

After more than 100 years of constantly evolving precedent, the Board has recognized that it has a long line of inconsistent decisions regarding challenges to bottleneck rates. See Met Ed, 5 I.C.C.2d at 402. The Board attempted to sort through, reconcile, and distinguish several of those inconsistencies in Met Ed (at 402-09) and the Bottleneck Decisions. Those decisions are the most recent pronouncements of the law as interpreted by the Board, and to the extent there may be some inconsistent older case law on this subject, those decisions clearly have been superseded.[7]

[7] In declining to cite any of this older case law, and instead citing only to a more recent decision in Chevron, which Sunbelt has distinguished above, UP also tacitly acknowledges the questionable value of the older precedent.

III. CONCLUSION.

For the reasons stated above, Sunbelt respectfully requests that the Board deny UP's Motion, because market dominance must be evaluated for the entire through movement when UP's rate is combined with the NS proportional rate to create a through rate. If the Board should decide to dismiss UP, it must clarify that Sunbelt may continue its challenge to the NS proportional rate and set forth the legal basis for such challenge.

Respectfully submitted,

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December 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing "Reply Of Sunbelt Chlor Alkali Partnership To Motion For Partial Dismissal Or, In The Alternative, Expedited Determination Of Jurisdiction Over Challenged Rates" to be served by both electronic mail and first class mail, this 6th day of December 2011, on:

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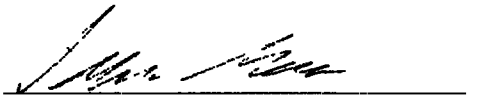

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